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Supreme Court of the United States.

No. ~~1032.~~

THE FIRE INSURANCE ASSOCIATION, (LIMITED),
PLAINTIFF IN ERROR,

vs.

JOHN W. WICKHAM, JUNIOR, *ET AL.*

BRIEF FOR PLAINTIFF IN ERROR.

By C. I. WALKER, Attorney.

Supreme Court of the United States.

THE FIRE INSURANCE ASSOCIATION, (LIMITED), PLAINTIFF IN ERROR,

vs.

JOHN W. WICKHAM, JR., AND WILLIAM B. COMSTOCK, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

By C. I. Walker, Attorney.

GENERAL NATURE OF THE ACTION.

1. This was an action brought by the defendants in error, against the plaintiffs in error, on two policies of fire insurance upon the Steamer St. Paul, and upon the issue formed, came up for trial before the Circuit Court for the Eastern District of Michigan, on the 28th of November, 1887, before the Hon. H. E. Jackson, Circuit Judge, and the Hon. H. B. Brown, District Judge.

2. On the trial some questions arose upon which there was a division of opinion between the Circuit and the District Judge.

3. The verdict was for the plaintiff, in the sum of $2,297.55.

Record, p. 26, f. 75.

4. The case was brought to this court by a writ of error, and a certificate of the division of opinion of the Judges of the Circuit Court.

Record, No. 1032 of the October Term, 1888.

5. The plaintiffs below, being the defendants in error, made a motion at the same term to dismiss the writ of error on the ground that the questions certified were not distinct points of law which could be properly certified to this court upon the difference of opinion between Judges of the Circuit Court.

6. This motion to dismiss was submitted to this Court upon briefs at the October Term, 1888, and this court held that one of the questions upon which the Judges certified did present a single question of law which gave this Court jurisdiction. 128 U.S. 426 ~~See Opinion of Judge Bradley of November 26,~~ 1888.

7. The case now comes before this Court upon the single question thus referred to, and upon which the Judges of the Circuit Court divided.

FACTS APPEARING ON THE TRIAL.

On the trial the following facts appear, and in relation to these there is no conflict, except as hereinafter set forth :

a. In 1883, the plaintiffs were owners of said Steamer St. Paul, engaged in navigating the great lakes, and the plaintiff Wickham was managing owner.

Record, p. 3, f. 32.

b. They obtained fire insurance policies on the same, amounting to $40,000.00, distributed as follows :

Continental of New York,	7,500 00
Liverpool & London & Globe,	6,000 00
Fire Insurance Association (two policies),	5,000 00
Queen's Insurance Company (two policies),	7,000 00
Security Insurance Company of New Haven,	2,500 00
Exchange Insurance Company of New York,	2,500 00
Mechanics' Fire Insurance Company of New York,	2,500 00
German Fire Insurance Company of Pittsburgh,	2,500 00
Prescott Insurance Company of Boston,	2,500 00
Greenwich Insurance Company of New York,	2,000 00

Record, p. 3, f. 32.

c. The plaintiffs also had $45,000.00 of insurance by marine policies on the same vessel and at the same time.

Record, p. 4, f. 33.

d. In all the policies save one, it was provided that in case of fire the loss should be payable in 60 days after the proof of loss has been filed with the companies.

e. In the other policy, that of the Liverpool & London & Globe Insurance Company, it was provided that any loss would not be payable until after certain examinations, appraisals, and in case of difference, reference to impartial persons.

Record, p. 4, f. 33-4.

f. On the 10th of November, 1883, while the said propeller St. Paul was on a voyage from the lower lakes to Lake Superior, a fire broke out in the hold of said vessel, and to save the vessel and cargo, the vessel was scuttled and sunk, and the fire thus extinguished.

g. The vessel was then raised and brought to Detroit for repairs, where, on the 24th of November, while her cargo was being unladen in Detroit, in order to make some repairs, a fire again broke out, and the vessel was again sunk for the purpose of saving the vessel and cargo, and was afterwards raised at considerable expense.

Record, pp. 4 and 5, f. 34.

h. On the 15th of December, 1883, a written agreement was made between the agents of the insurance companies and the plaintiffs for the purpose of adjusting the loss caused by said fires to the hull of said vessel, her tackle, &c.

Record, p. 5; f. 35, ~~36 and 36~~. A. 26 f. 76

i. Under this agreement the loss so adjusted aggregated $15,364.70, and was apportioned among the several insurance companies as follows:

Continental Ins. Co.	$2,880.90
Liverpool & London & Globe,	2,304.70
Fire Ins. Ass'n (2 policies),	1,920.60
Queen's Ins. Co. (2 policies).	2,688.84
Security Ins. Co. of New Haven,	960.30
Exchange Ins. Co. of New York,	960.30
Mechanic's Fire Ins. Co of New York,	960.30
German Ins. Co. of Pittsburg,	960.30
Prescott Ins. Co.,	960.30
Greenwich Insurance Co.,	768.24

Record, pp. 5 and 6, f, 36.

j. Proofs of the loss thus adjusted and apportioned were sent, by the agents of said companies, from Buffalo, on the 12th of January, 1884, to the several insurance companies at their offices in New York, and were received in due course of mail.

Record, p. 5; f. 35 and 6.

k. At the same time notice was given to said companies that the assured would make further claims for the expenses of raising said vessel.

Record, p. 5; f. 36.

l. It was admitted that the cost of raising and saving said vessel was upwards of $15,000.00.

Record, p. 6; f. 37.

m. The plaintiffs admitted that they had been paid the cost of repairing the vessel, as set forth in the adjustment and proofs of loss already mentioned.

Record, p. 6; f. 37.

n. The plaintiffs claim, that the payment was solely with reference to the loss, especially set out in said proofs of loss, and had no reference whatever to the loss and damage caused by the raising and saving of said vessel.

Record, p. 6. f. 37

The defendants claim that the payment of the cost of said repairs was made by way of accord and satisfaction of the plaintiffs' entire claim.

SUITS.

1. Under this state of facts, the plaintiffs demanded of the insurance companies, payment for such loss and damage, which was refused.

Record, p. 6; f. 37.

2. On the 12th of November, 1884, the plaintiffs commenced suit against the defendants, in the Circuit Court for the Eastern District of Michigan, upon the two policies of insurance which had been issued by the defendants to the plaintiffs.

Record, pp. 1, 2.
See Declaration, pp. 27-32.

To this declaration the plaintiffs pleaded the general issue, and notice that they would prove upon trial, that the claim sued upon had been compromised, and that there had been a complete accord and satisfaction.

Record, pp. 32-34.

On the same day, the plaintiffs commenced suits of the same general character against the following insurance companies, to recover for losses by the same fires :

The Liverpool & London & Globe Insurance Co.
The Security Insurance Co. of New Haven, Conn.
The Exchange Insurance Co. of New York.
The Mechanics' Fire Insurance Co. of New York.
The Prescott Insurance Co. of Boston.
The Greenwich Insurance Co. of New York.

On the 25th of November, they commenced a similar suit against the Queen's Insurance Co. of England, and on the 24th of January, 1885, they commenced suit against the German Fire Insurance Co. of Pittsburg.

Record, p. 2.

3. On the 1st day of April, 1885, the court entered an order of consolidation of these various cases, which provided that all of said cases should abide the event and final determination of the one case which the plaintiffs might elect to try, and if the verdict and judgment should be in favor of the plaintiffs, the verdict and judgment should be entered against each of said several defendants for such damages as might be awarded in each of said cases, and if judgment was entered in favor of the defendants in the case thus tried, similar verdicts and judgments should be entered in favor of the several defendants, but the order was not to affect the rights of the several parties to move for a new trial, or take out a writ of error, or otherwise interfere with such judgments, and the court reserved the right to qualify or modify the order.

Record, pp. 2 and 3.

4. Under this order the present case came on for trial on the 8th of November, 1887, before said Judges Jackson and Brown.

Record p. 3 f 32

DEFENSE.

The defendants, for the purpose of showing an accord and satisfaction of the entire claim growing out of the said fires, introduced among other things, Exhibit "Q Q," being a certificate or stipulation, bearing date January 19th, 1884, as follows:

New York, January 19th, 1884.

This is to certifify, that the loss and damage by fire, which occurred on the 23rd day of November, 1883, to the steamer St. Paul, is this day adjusted for the sum of fifteen thousand three hundred and sixty-four and 78-100 dollars, ($15,364.78) payable without discount, upon the presentation of the policies to the several companies interested by the assured, and apportioned among the several companies, as follows, viz:

	Insures.	Pays.	
Continental of New York,	$7,500 00	$2,880 90	Paid
London & Liverpool & Globe,	6,000 00	2,304 70	Paid
Fire Ins. Association,	3,500 00	1,344 42	Paid
Queens of England,	7,000 00	2,688 84	Paid
Fire Ins. Ass'n, 2 polices,	1,500 00	576 18	Paid
Security of New Haven,	2,500 00	960 30	Will remit
Exchange of New York,	2,500 00	960 30	Paid
Mechanics' of New York,	2,500 00	960 30	Paid
German of Pa.,	2,500 00	960 30	Will remit
Prescott Ins. Co.,	2,500 00	960 30	Remitted
Greenwich of New York,	2,000 00	768 24	Paid
			(1, 19, '84.)
	$40,000 00	$15,364 78	

(Signed.)
JOHN K. OAKLEY,
J. H. WELLMAN,
Committee.

JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per JOHN W. WICKHAM, JR.

Record, p. 11.

Defendants also introduced various papers in the nature of receipts and discharges, executed by the plaintiffs to the several Insurances Companies, against whom said suits had been commenced, a list of which is as follows:

1.

A receipt given to the defendants, bearing date January 19th, 1884, referring to one of the policies of insurance sued upon, and which is in the following words:

$1,344 42. January 19th, 1884.

Received from the Fire Insurance Association of London, England, thirteen hundred and forty four 42-100 dollars, it being in full of all claims and demands of loss or damage by fire, which occurred on the 10th and 24th days of November, 1883, to property insured by policy No. 180,617, Buffalo, New York Agency, and in consideration of said payment, said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

(Signed.) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM.

2.

Claim, $1,344 42.
Discount,
Draft, January 19th, 1884.

In consideration of four 47-100 dollars, return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Fire Insurance Association, Limited, of England.

(Signed.) JOHN W. WICKHAM, JR.,
Managing Owner.
W. B. COMSTOCK,
Per WICKHAM, JR.

3.

A similar receipt in relation to the other insurance policy issued by defendants.

Record, p. 7.

4.

A receipt of the same date to the Mechanics' Fire Insurance Co., substantially of the same character.

Record, p. 7.

5.

A reecipt to the Queen's Insurance Company of the same date, substantially like the other receipts, except that it is given "as per compromised settlement."

Record, p. 8.

6.

A receipt to the Liverpool & London & Globe of the same date, substantially like the last.

Record, pp. 8 and 9.

7.

A receipt to the Greenwich Insurance Co., of the same date, "in full settlement."

Record, p. 9.

8.

A receipt to the Security Insurance Co., of the same date, substantially like the others.

Record, p. 9.

9.

A receipt to the Prescott Insurance Co., dated January 22nd, '84, substantially like the others.

Record, pp. 9 and 10.

10.

A receipt to the German Fire Insurance Co., dated January 31, 1884, containing some peculiar provisions, but substantially like the others.

Record, pp. 10 and 11.

Defendants then rested.

A CONSIDERATION.

There was a good consideration for these receipts: contracts of cancelment and discharge and accord and satisfaction.

Assuming that the insurance companies were liable for all the losses occasioned by fire, such losses were not payable until

60 days after the filing of proofs of loss in the offices of the several companies.

Record, p. 4, f. 33.

These proofs were forwarded from Buffalo on Saturday, January 12, 1884, and could not have been received at the offices in New York, before Monday, January 14th.

Record, p. 5, f. 55.

Most of the payments were made on the 19th of January, five days after such proofs of loss were filed, and 55 days before any payments became due thereon.

The last payments were made January 31st, nineteen days after the filing of such notice, and 41 days before the payments became due.

Record, pp. 16 and 17, f. 56.

The payments of the money in advance of its being due was a good consideration for the discharge of the entire claim; although the payments were for a much less sum than was actually due.

2 Parsons on Contracts, 618 and 19.
Pennent's Case, 5 Coke, 117.
Brooks vs. White, 2 Met., 283.
Smith vs. Brown, 3 Hawk's, 580.
Boyd vs Moak 75 Ky. 157

The District Judge, in his charge to the jury, very clearly stated this proposition.

Record, pp. 23-4, f. 17.

PAROL TESTIMONY.

The plaintiffs, for the purpose of varying and contradicting the papers thus given in evidence by the defendants, introduced parol testimony, all of which was objected to by the defendants in the absence of fraud, misrepresentation and mistake.

Record, p. 13, Sec. 41.

The objections were overruled by the presiding judge, and the evidence was received and submitted to the jury.

Record, p. 13, Sec. 11.

The parol testimony thus offered is found in the record from page 11 to 17, and the following is a fair synopsis of the same.

From its very character it must have been the sole testimony of Wickham.

1. In January, 1884, the plaintiff Wickham, came to New York, and was there on the 18th of said January.

2. On the 18th of said January, the insurance companies interested in the claim made, had a meeting at the board rooms in New York, at which meeting Messrs. Wellman and Oakley were appointed a committee to confer with the plaintiffs in regard to said loss.

3. On the following day, January 19th, said committee had an interview with said Wickham, and they notified him that they were appointed as such committee, and that the companies were ready and willing to pay the amount of loss set forth in said proofs of loss, and that the companies were satisfied with the adjustment thereof.

4. Plaintiff Wickham then called their attention to the claim for raising and saving the vessel, and stated substantially that he would bear a portion of that expense himself for the sake of settlement, but the committee replied that they were not liable for such expense, and had no authority to consider the claim for raising and saving said steamer.

Record, p. 12.

5. Wickham testified, that the plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the releasing or compromising of said claim spoken of, except as Wickham offered to settle as hereinbefore stated.

Record, p. 13.

6. In this interview, Mr. Oakley, in behalf of the Mechanics' Co., gave to Wickham a check for the amount of adjusted loss, and Wickham then signed the receipt in evidence, and he signed Exhibit "QQ," and Oakley gave the same to Wickham to exhibit to the representatives of the other companies, to show the amount of adjusted loss which had been apportioned among said companies, respectively.

Record, p. 13.

7. Plaintiffs then offered evidence to show that after the Exhibit "QQ," had been signed by Wickham, he was asked to surrender his policy, under a clause in said policy, which is set out.

Record, p. 13, No. 13.

8. The record expressly shows that there was no evidence given by the plaintiffs ; that Exhibit "QQ," and the receipts and discharges, executed by the plaintiffs and offered in evidence by defendants, "were obtained by fraud or misrepresentation of the defendants or their agents."

Record, p. 17, No. 16.

9. All such parol evidence was objected to by the defendants.

Record, p. 13, No. 11.

10. This testimony of Wickham in relation to what took place at the meeting with the committee was contradicted by the testimony of Messrs. Wellman and Oakley, who constituted the committee.

They testified expressly :

1.

That they did not state that they had no authority to consider the claim of raising and saving the steamer. On the contrary they testified that they were clothed with full power in the matter.

Record, pp. 13, 14.

2.

They did not admit that they were ready and willing to pay the expenses of making repairs, &c., as set forth in the proofs of loss.

Record, p. 14.

3.

They did not deny their liability for raising and saving the vessel, but stated that they would neither admit nor deny their liability.

Record, p. 24.

4.

They denied that they said they were satisfied with the proofs of loss. On the contrary, they criticized said proofs, and expressed their doubts as to the liability upon such proofs.

Record, p. 14.

5.

They denied that Wickham was never desired to compromise and release the entire claim. On the contrary, they insisted

that the whole matter should be settled, or that nothing would be paid.

Record, p. 14.

6.

The defendants' testimony also shows that Mr. Wickham took this certificate, Exhibit "QQ," and went around to most of the companies that very day, showing the certificate and getting his money, and that at some of the offices he stated very distinctly that the whole matter had been compromised and settled.

Record, p. 15.

QUESTION.

The question upon which the court divided was, whether the parol testimony thus offered by the plaintiffs to vary and contradict the certificate, Exhibit "QQ," and the receipts and other papers hereinafter set forth, was admissible.

Record, p. 18.

On this question the court divided in opinion. The circuit judge holding that it was admissible, and it was admitted.

Record, p. 18.

This court has held, that this question was purely a question of law, that gave jurisdiction to this court to determine it.

See Decree of Judge Bradley, Nov., 1888.

GENERAL RULE.

There is really no conflict of authorities upon the general rule as to the introduction of parol testimony to affect written contracts.

The doctrine, as very clearly stated by Judge Storey, is as follows:

"Parol evidence is not admissible to contradict, qualify, extend or vary written instruments, and the interpretation of them must depend upon their own terms."

2 Storey's Equity, Sec. 1531.
See also 1st Greenleaf's Evidence, Secs. 275, 281 and 282.
2 Wharton's Evidence, Sec. 920 and 929.

Nowhere has this doctrine been more clearly recognized than in the decisions of this court.

In an early case, Chief Justice Marshall said: "It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to a written instrument."

Hunt vs. Rousmanier, 8 Wheaton, 174.
Bank of U. S. vs. Daney, 6 Peters, 51 and 56.
Brown vs. Wiley, 20 How., 442 and 447.
U. S. vs. Childs, 12 Wall., 232, 284.
Specht vs. Howard, 16 Wall., 564.
Burnes vs. Scott, 117 U. S., 582.
Buffinger vs. Tuyes, 120 U. S., 203.

The cases are very numerous in the state courts where the same doctrine has been clearly stated and enforced.

Corse vs. Peck, 102 New York, 213.
Brewster vs. Potruff, 55 Mich. 129.
Highstone vs. Burdett, 61 Mich. 59.
Weekins vs Newberry 101 N. C. 17

Of course there are exceptions to and qualifications of this rule.

Thus, as stated by Judge Storey and Chief Justice Marshall, that in cases of fraud, misrepresentation or duress, this may be shown by parol testimony for the purpose of showing the contract to be void and of no effect.

So, if a written contract has been executed and delivered, but with a clear and distinct understanding that it was not to have effect until a certain condition had been performed or until a certain event had happened, this may be shown by parol.

Ware vs. Allen, 128 U. S., 590.
Reynolds vs. Robinson, 110 N. Y., 654.

These cases are upon the clear and sensible doctrine that no contract was ever actually made, or had taken effect.

Another clearly recognized exception is, that oral testimony is admissible to contradict or vary the terms of simple receipts for money, and this upon the ground that they are informal, and are not in the nature of contracts, and as said by Parsons, they are hardly "an instrument at all," and have little more force than an oral admission of the party receiving.

2 Par. on Contracts, 555.
2 Whart. Ev., 920, 1064.
1 Greenleaf's Ev., Sec. 305.

If a receipt is connected with a contract, the receipt may be varied or contradicted by parol, but not the contract. The authorities upon this subject are very clear.

In the argument in the court below, the counsel for the plaintiffs insisted, that by the decisions of the state of New York, a contract or receipt like the one in question, can be contradicted in all its parts.

We have examined the New York cases cited, and we submit that a careful examination will show that they are in harmony with our position in this case, and we call attention to some of the New York decisions.

Eggleston vs. Knickerbocker, 6 Barb., 458, 466.

In this case one party had paid money to the other, and took a receipt, stating that the money was received on a bond and mortgage therein mentioned.

The question raised was whether it could be proved by parol that there was a co-temporaneous verbal agreement that the money was not so to be applied.

The question was very fully argued, and carefully considered by the court. It was stated. "Even with respect to a receipt, it is only the consideration part which can be explained by parol." * * * * * "But when a receipt is in the nature of a contract, it is so far within the general rule, and is not liable to be varied by parol."

In the present case, the receipts in terms express the manner in which the money was to be appropriated, and on principle and authority cannot in that respect be contradicted.

This question was very fully considered before the court of appeals in *Coon vs Knap*, 4 Seld., 402.

In that case a woman had been injured while riding in a stage coach, and soon after made some settlement with the proprietors, and gave the following receipt.

"Rec'd, Brookfield July 11, 1849, of William B. Knap, $40.00 in full, for damages done to us by the stage accident on the 13th of June last."

Subsequently an action was brought against the stage company, and the question was whether she could prove that at the time she received the money and gave the receipt, there was a condition or qualification in relation thereto.

The case in the 6 of Barb., was distinctly affirmed, and the court, stating with reference to that case, "We held also that a receipt absolute in its terms, cannot be shown by parol evidence to be upon a condition, except on the proceeding to reform the instrument for fraud or mistake, and we observed that if that receipt was in the nature of a contract, it fell within the general rule applicable to contracts," and by the unanimous decision of the court, it was held that parol testimony was inadmissible to vary the receipt.

The court further said, "The receipt in this case, although not expressed to be upon a compromise, clearly was so upon its face. It was therefore in the nature of a contract, and is so far within the general rule, that it is not liable to be varied by parol evidence." The same principle is clearly recognized in two decisions given by Judge Nelson.

Creery vs. Holly, 14 Wen., 26.
Kellogg vs. Richards, 14 Wen., 116.

In this last case, the court say, "When a technical receipt can be explained by oral evidence, and is in this respect an exception to the general rule of evidence applicable to written instruments, has been repeatedly ruled and acted upon by this court." * * * * * "The relaxation of the rule of evidence above referred to, should not extend beyond the spirit of the terms in which it is expressed, *and must be confined to the case of the receipt in the strict sense of that term.*"

Ib. p. 118.

One of the cases cited from New York by the plaintiffs below, was that of *Ryan vs. Ward, et al*, 48 N. Y., 204, which simply holds, that when a party pays a sum upon an undisputed account but not in full thereof, and takes a receipt in full, the other party may still recover the balance, and this for the very good reason that there was no consideration for the discharge.

Another case thus cited by the plaintiffs, is that of *Smith vs. Holland*, 61 N. Y., 635, which simply holds, that where in a promissory note is embodied, also a receipt, the receipt is open to explanation, the same as if it were in a separate instrument.

Another case thus cited, is that of *De Lavallett vs. Wendt*, 75 N. Y., 579.

In that case a receipt had been given in the following words:

$500.00. New York, November 3, '66.
Received from D. M. Peyser, $500 due on demand.

The question was, whether oral testimony could be introduced to show that this was meant for a receipt, and not for an obligation.

The court said it was a question of difficulty, as the paper was not on its face an equivocal or complete promise to pay, and under these circumstances the testimony was admitted.

75 N. Y., p. 583.

None of these later cases are inconsistent with the earlier cases of N. Y., but are in entire harmony with them, and with our position.

Tisloe vs. Greater, 1 Blackf.,,353.

In this case a receipt was given in the following terms:

"Rec'd Vincennes, September 14th, 1832, of P. Tisloe, $200.-00 for safe keeping."

In a suit growing out of this matter, it was offered to be shown by parol, that the $200.00 was a payment and not a deposit.

The court held that this could not be done by parol testimony.

Dale vs. Evans, et al., 14 Ind., 288.

In this case a receipt was given in the following words:

"Received July 22d, 1856, of J. T. Dale, 179 bushels of wheat, to be paid for at the market price when called for.
J. L. & W. N. Evans & Bauchort."

Soon after this the wheat was burned, and the person receiving the wheat, offered to prove by parol testimony that it was not a sale of the wheat, but that it was a mere deposit.

The court held that this could not be done, and in the following language:

"Where a writing in the form of a receipt is the mere acknowledgment of the payment of money, or the delivery of a thing, it is but *prima facie* evidence of the fact; but if it also contains a contract to do something in relation to the thing de-

livered, in so far as it is evidence of that contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol testimony, except perhaps, that at law the same circumstances of fraud, mistake or surprise, may be shown to set it aside, as might be shown in equity to relieve from a contract," &c.

Alcorn vs. Morgan, 77 Ind., 184.

The gist of this case is sufficiently shown by the following extract from an opinion of the court.

"The written instrument relied upon by the appellee as showing a written lease, is in form a receipt, but it also contains independent stipulations, and is therefore to be regard as a contract."

Parol evidence is admissible to vary or contradict a receipt, where, however, the terms of the contract are therein incorporated, parol evidence is not admissible to add to or take from the terms of the contract as expressed in the writing.

Fay vs. Gray, 124 Mass., 500.

The plaintiff had loaned the defendant $1000.00 for which he had given him the following receipt:

"Boston, January 4th 1876.

Received from Solomon S. Gray, twenty-five shares of American Molded Collar Stock, as collateral to loan of $1000.00 at two per cent. per month at one day's notice."

At the trial an offer was made to prove that before and at the time of signing the receipt on January 4th, 1876, an oral agreement was made that the stock might be used by him, and in default of payment, be sold at private sale, but the circuit judge excluded the evidence.

The supreme court, in delivering the opinion of the court, said:

"This receipt contains in concise language the contract under which the plaintiff took the stock, and it was not competent for him to prove by parol, that when he took it and signed the receipt, a different arrangement from that stated in the receipt was made."

A recent Massachusetts case illustrates the same principle.

The plaintiff had a claim in trover against two persons for the conversion of a horse of the value of $225. He received of one of them $112.50, "in full payment as per claim." In a suit against the other party to recover the balance the court said: "It is not open to the plaintiff to contradict the writing by parol testimony that the sum paid was intended as a part and not as a full payment."

Gross vs. Ellerson, 136 Mass., 503.
S. P. Brown vs. Cambridge, 3 Allen, 474.

In a recent case in Kansas a receipt had been given "in full payment and satisfaction of any claim I may or might have for damages."

The Court held that this was something more than a receipt: "It partakes of the nature of a contract, and as such, of the conclusiveness of written contracts."

The Kansas C. & O. R. Co. vs. Hicks, 30 Kansas, 288.

There are many cases that hold that where a contract and a receipt are combined in the same written instrument, that while the simple receipt may be varied by parol testimony, that the contract connected therewith cannot thus be affected.

Lowe vs. Young, 59 Io., 364.
Hewitt vs. C. B. & Q. R. R. Co., 63 Io.,,611.
Bemiss vs. Becker, 1 Kansas, 226. 240.
Edgerton vs. Emerson, 3 Foster, 555, 564.

So in relation to bills of lading and warehouse receipts.

Graves vs. Hammond, 9 Barb., 481.
O'Brien vs. Gilchrist, 34 Me., ~~584,~~ 554
Stewart vs. Phœnix, Ins. Co., 9 Lea., 104.
Smith vs. Brown, 3 Hawks, 580.

QUESTION.

In the light of these authorities we submit that it is clear that the court erred in admitting parol testimony to contradict or vary the papers put in evidence by the defendants.

A concise re statement of the leading facts, bearing upon this point, showing the circumstances under which it was offered and admitted, will make the same very clear.

1. The plaintiff's had made out a *prima-facie* case.

a. In addition to proving ownership of the Steamer St. Paul; the plaintiffs had proved insurance against fire by several companies for the aggregate sum of $40,000.00.

Record, p. 3.

b. He proved the loss by two fires, occurring on the 10th and 24th of November, 1883.

Record, p. 4.

c. He had proved two distinct kinds of loss.

1. Loss to the hull and appurtenances of the vessel.

2. Costs and damages incurred in raising the vessel, and saving the cargo.

d. The amount of the first class of loss was adjusted by an agreement betwent the various insurance companies and the plaintiffs.

The loss amounting to $15,364.78 was apportioned among the different companies in proportion to the amount of their policies.

Record, p. 5 and 6.

The other class of losses, the raising and saving of the vesse and cargo, was upwards of $15,000.00.

Formal proofs of the first class of loss were filed with the several companies as required by the policies.

The plaintiffs then rested.

Defendants then offered and produced in evidence, several papers in the form of receipts, discharges, &c., which they claimed operated as a full accord and satisfaction of the entire claim.

1. Exhibit "QQ," being a certificate signed by the plaintiffs, dated the 19th of January, 1884, stating that the loss by the fire of November 23rd, 1883, had been adjusted for the sum of $15,364.78, being exactly the amount of the adjusted loss already ment oned, and "payable without discount upon presentation of the policies to the several companies."

Record, p. 11.

This certificate only mentions the fire of November 25th, but it is entirely clear that it refers to the two fires, as the amount mentioned corresponds precisely with the adjustment already referred to.

Record, pp. 5 and 11.

2. A receipt, signed by the plaintiffs, of the same date to the defendants, the Fire Insurance Association, for $1,344.42, in full of all claims and demands for loss or damage by fire, which occurred on the 10th and 24th days of November, 1883, insured by policy No. 180,617, and in consideration of said payment the said policy is cancelled and surrendered, and all further claims by virtue thereof, forever waived.

Record, p. 6.

Other receipts, similar in their character, executed to the several insurance companies, were also introduced.

Record, pp. 6-11.

Two of these receipts in express terms stated, that the money was paid and received "as per compromised settlement."

See receipt of Queen's Ins. Co., and the Liverpool & London & Globe Co.

Record, p. 8.

These papers were much more than simple receipts. They contained all the elements of a valid contract.

1. There were good considerations therefor, and the parol testimony does not contradict that the money was paid as stated.

By the terms of the insurance policies, payments of losses became due 60 days after the proofs of loss had been filed with the companies.

Record, p. 4.

These proofs were filed, as we have seen, on the 14th of January, and the payments for the most part were made on the 19th, being 55 days in advance of the time when the payment became due.

That the payment in advance is a good consideration for the settlement, is entirely clear from the authorities.

2. In consideration of that payment there is an express agreement that the policies were cancelled and surrendered.

3. And also all other claims by virtue of the same were waived.

4. It is entirely clear, therefore, that this case does not come within the exceptions of the general rule, and that the parol testimony was inadmissible under the circumstatces.

C. D. Walker,

for Plff. in Error.

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Office Supreme Court U. S.
FILED.
OCT 28 1891
JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States.

No. 1089.

THE FIRE INSURANCE ASSOCIATION, (LIMITED), PLAINTIFF IN ERROR,

vs.

JOHN WICKHAM, JR., *ET AL.*

SUPPLEMENTAL RRIEF FOR PLAINTIFF IN ERROR

By C. I. Walker, Att'y.

This supplemental brief is prepared for the purpose of presenting the facts embodied in the record in a more narrative form, and in the order in which they occur, thus giving a clearer idea of the case.

The law points are fully discussed in the original brief to which I refer.

FACTS.

1st. The plaintiffs below, in 1883, were owners of the Propeller St. Paul, engaged in navigating the great lakes, and the plaintiff Wickham was the managing owner.

Record, p. 3, f. 32.

2d. About the 1st of April, the plaintiff obtained fire insurance policies on said propeller in ten different fire insurance companies amounting in all to $40,000.

Ib., p. 3, f. 32.

The defendants below issued two of these policies amounting to $5000. Ib., p. 3, f. 32. In all of these policies save one, it was provided that in case of loss by fire, the loss should be payable in 60 days after proofs of loss had been filed with the companies. In the other policy there was still greater delay in getting the pay.

Ib., p. 4, f. 33.

3d. The propeller suffered from two fires. One on the 10th, and the other on the 24th of November, 1883. In both cases the vessel was sunk to save it from destruction.

Ib., p. 4, f. 34.

4th. On the 15th of December, 1883, a written agreement was made between the plaintiffs and the adjusting agents of the insurance companies to fix the amount of the loss caused by said fire, to the vessel and its appendages, but not including the expense of raising and saving the vessel and cargo.

Ib., p. 5, f. 35. Same Ib., pp. 26 and 27, f. 76 and 77.

5th. This adjustment was made and the insurance companies were notified thereof. The total estimated loss by the fire was $15,364 78, which was duly apportioned among the several companies. The defendants' portion being $1920.

Ib., pp. 5 and 6, f. 36.

This notice was sent from Buffalo to New York, Saturday, the 12th of January, 1884, and could not have reached the offices of the companies in New York, earlier than January 14th, 1884.

Ib., p. 5, f. 30.

6th. The adjuster who gave the notice, informed the companies that this adjustment included only the direct loss by fire and water, and a further claim would be made for raising the vessel. Ib., p. 5, f. 36. The damage and cost of raising and saving the vessel was over $15,000.

Ib., p. 6 f. 37.

7th. As early as the 19th of January, 1884, the plaintiff Wickham, managing owner, met a committee appointed by the insurance companies, and after a conference, they agreed to and signed the Exhibit "QQ."

Ib., pp. 11 and 13, f. 45 and 50.

They adjusted the loss at the same sum as that fixed by the adjustment of December, and it was apportioned among the different companies, and by the terms of the agreement, the amounts were "payable without discount, upon presentation of the policies to the several companies."

Ib., p. 11, f. 45.

8th. Quite a number of the insurance companies paid the plaintiffs on the same day the amount thus adjusted and apportioned, while a few were paid a few days later; but all were paid in the month of January, and the plaintiff executed receipts therefor that are embodied in the record, and in some cases the policies were surrendered.

Ib., pp. 6 to 11.

9th. The plaintiffs admit that they were thus paid the cost of repairing the vessel, etc., as adjusted by the contract of December 15th. Ib., p. 6, f. 37. Ib., p. 5. Ib., p. 26, f. 76. But they claim they had been paid no part of the expense of raising and saving the vessel and cargo, and they demanded pay before commencement of suit.

Ib., p. 6, f. 37.

10th. On the 12th day of November, 1884, or within a few days thereafter, the plaintiffs commenced suit in the United States Circuit Court for the Eastern District of Michigan, against the several insurance companies mentioned.

Ib., pp. 1 and 2, f. 27 and 30.

11th. On the 1st day of April, 1885, an order was entered by the court consolidating the cases thus commenced.

Ib., pp. 2 and 3, f. 31.

12th. This case came on for trial before Judges Jackson and Brown on the 8th day of November, 1887, and the plaintiff made out a *prima facie* case and rested.

Ib., pp. 3 to 6, f. 32 to 37.

The plaintiffs admit having received pay for the cost of repairing the vessel, as set forth in the adjustment of December, 1883.

Ib., p. 6, f. 37.

13th. The defendant claimed that the payment of the repairs was made by way of accord and satisfaction of the plaintiffs' entire claim, to prove this, he offered the stipulation of January 19th, 1884, being Exhibit "QQ." and a large number of receipts executed by the plaintiffs

Ib., pp. 6 to 11, inclusive, f. 37 to 45.

14th. The defendant having rested, the plaintiff offered parol evidence for the purpose of varying, qualifying or contradicting the written papers thus put in evidence.

Ib., pp. 11 to 15.

Before considering this evidence, I call attention to two important averments in the record. This sets forth substantially all the material evidence given in the case. There was no evidence of said agreement. Exhibit "QQ." together with said several receipts and discharges executed by the plaintiffs, were obtained by any fraud or misrepresentation of the defendants or their agents.

Ib., p. 17, f. 56 and 57.

This raises the only question in the case, and was the one on which the judges were divided. This court has already decided that it raises a pure question of law.

Fire Insurance Association vs. Wickham, 128 United States, 426.

The defendant objected to this parol testimony.

Ib., p. 13, f. 50.

The objection was overruled by the presiding judge and upon this point the judges were divided.

Ib., p. 17, f. 57.

15th. The general rule as to parol evidence, being admitted, to vary or conflict with a written contract is clearly stated in the original brief, and will not be repeated here.

Brief, pp. 12 and 13.

We submit that these receipts are clearly contracts, that there was an actual consideration, the money having been paid in advance of its becoming due according to the terms of the policy.

The receipts are also dispositive and they dispose of valuable interest.

See pp. 6 and 7 of the Record.

The exception to the general rule as to excluding parol testimony, are fully stated in the original brief.

Brief, pp. 13 and 14.

We submit that it is very clear that it was manifest error to admit the parol testimony to vary or contradict the receipts put in evidence.

C. J. Mackey

for Plaintiff in error

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Supreme Court of the United States.

THE FIRE INSURANCE ASSOCIATION, (Limited,)
Plaintiff in Error,
vs.
JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK,
Defendants in Error.

BRIEF OF C. I. WALKER, OF COUNSEL FOR PLAINTIFF IN ERROR, ON THE MOTION TO DISMISS.

This case is brought to this court by writ of error, on the certificate of division of opinion between the circuit and district judges, who tried the case in November, 1887.

See printed record.

Defendants in error, and plaintiffs below, move to dismiss the case on the ground that the record does not show that this court has any jurisdiction under the statutes in relation to cases coming to this court by certificate of division. The main point being that

it does not show that the judges did disagree upon any distinct points of law.

We claim that the record clearly shows such disagreement.

FACTS.

The following undisputed facts clearly appear from the record, and as to these, no question is raised.

1. The plaintiffs below (defendants in error), were in 1883, owners of the steamer St. Paul, Wickham being the managing owner.

Record, p. 3, Section 1.

2. They obtained fire insurance upon her in ten different insurance companies, for different amounts, aggregating $40,000.00. The plaintiff in error issued two of these policies amounting to $5000.00.

Record, p. 3, Section 2.

In all of these policies, save one, it was expressly provided that in case of a loss by fire, it should be payable 60 days after the proof of loss had been filed with the companies.

Record, p. 4, Section 4.

3. There was also $15,000.00 of insurance on the same vessel by marine policies.

Record, p. 4, Section 3.

4. In November, 1883, the steamer was injured by two different fires, several days apart, and in both cases the vessel was scuttled and sunk to extinguish the fire, and was afterwards raised at considerable expense.

Record, pp. 4 and 5, Section 5.

5. There was two distinct classes of loss growing out of these fires.

a. The loss caused by the fire to the hull of said vessel, including tackle, furniture and appurtenances.

Record, p. 5, Section 6.

b. The cost of raising and saving said vessel and the cargo which had thus been sunk, which amounted to over $15,000.00.

Record, pp. 4 to 6, Sections 5, 7 and 9.

6. On the 15th of December following, a written agreement was entered into between the insured and the adjusting agent of the insurance companies for adjusting the first class of injuries, but excluding the second class.

Record, p. 5, Sections 6 and 7.
Also Record, p. 20, Exhibit "A."

7. Under this agreement the direct loss by fire was adjusted on the 26th of December, at $15,364.78.

Record, p. 5, Section 7.

8. On the 12th of January, 1884, proofs of the loss thus adjusted were sent by the adjusting agent at Buffalo, to the several insurance companies, at their offices at New York, and were received in due course of mail. The 12th being Saturday, they could not have been received before Monday the 14th.

Record, p. 5, Section 7.

Accompanying these notices was a notice that the insured would make further claims for the expense of raising said vessel.

Rebord, p. 5, Section 7.

9. On the 18th of January, a meeting of the companies interested in said loss, was held at the Board Rooms, New York, and a committee consisting of Messrs. Oakley and Weldman was appointed to confer with the insured. As to what passed at this meeting, is not very clear, but they passed a resolution that the request of the insured, to help him out, be not granted, but they recommended the companies to pay the amount of the proof of loss presented, but the whole matter was referred to the committee mentioned with full power, and upon this last point there is no conflict.

Record, pages 12 and 13. Sections 10 and 12.

10. On the following day, January 19th, this committee had a conference with Mr. Wickham, the managing owner. The result was that they entered into and signed a written agreement, being Exhibit "QQ," on page 11 of the record, certifying that the damage by fire to the St. Paul had been adjusted for the sum of $15,364.78, (being just the amount of the proofs of loss,) payable without discount upon the presentation of the policies to the several companies, and the amount thus to be paid was apportioned among the several companies, by said writing.

See Record, page 11.

As to the conversation that took place at this interview, the testimony is in direct conflict, but in our view of the case, it is utterly immaterial.

See Pages 11 to 15.

11. The testimony shows (this is not contradicted,) that Mr Wickham took this Exhibit "QQ," and went around to most of the companies that very

day, and showed it, and got his money in accordance with the same.

Record, pages 12 and 16. Sections 12 and 14.

12. On the same day (January 19th) he called at the office of the plaintiffs in error, and they paid to him the amount apportioned to them by said certificate, Exhibit "QQ," being on one policy, $1,344.42, and on the other $576.18; and he executed in behalf of himself and co owner, and delivered to the plaintiffs in error, receipts and releases, which are precisely alike, except as to the amount and number of the policies.

See pages 6 and 7, Sec. 9.

These papers thus executed were not only receipts for the money thus paid and received, but were a discharge in full of all claims and demands for loss or damage by fire, which occurred on the 10th and 24th days of November, 1883, to the property insured by the policies named, and said policies were canceled and surrendered, and all their claims by virtue thereof were waived.

Ib.

At the same time the formal cancelation of the policies were executed and delivered.

Ib.

13. On the same day, or within a few days thereafter, the said Wickham as managing owner, executed similiar papers to the several other insurance companies, and received the amounts apportioned to each by said Exhibit "QQ."

Record, pages 7-10. Section

14. No further steps were taken until the 12th

of November, 1884, when this suit was commenced in the United States Circuit Court for the Eastern District of Michigan, to recover for the expenses and damages connected with raising, and rescuing said vessel.

Record, pages 1 and 2 and 27-31.

The defendants pleaded the general issue, and a full settlement of the claim in the nature of accord and satisfaction.

See Record, pages 32 and 34.

About the same time similar suits were commenced against several of the fire insurance companies, which had issued policies upon said vessel.

Record, page 2. Section 2.

15. On the first day of April, 1885, an order was entered in the nature of an order of consolidation of all the suits thus commenced, so that the result of one suit would determine the others.

Record, pages 2 and 3. Section 3.

16. The last trial of this cause came on November, 1887, before a jury, Hon. Howell E. Jackson, Circuit Judge, presiding, associated with Hon. Henry B. Brown, District Judge.

Record, page 3. Section 4.

The plaintiff made out a prima facie case,

a. By showing that they were owners of the steamer St. Paul.

Record, page 3. Section 1.

b. By proving the insurance already mentioned.

Record, page 3. Section 2.

c. By proving the fires of November 10th and 24th.

Record, page 4. Section 5.

d. It was admitted that the cost of raising the vessel was over $15,000.00.

e. The amount of loss as shown in the proofs.

Rec., p. 6, Sec. 9.

The plaintiffs also admitted that they had been paid the cost of repairing the vessel, as set forth in the proofs of loss.

Ib.

But they claim they had not been paid any part of the cost of raising and saving said vessel.

Ib.

DEFENCE.

17. The defendants claimed that the whole matter had been settled by way of accord and satisfaction.

Ib.

To prove this, they put in evidence the Exhibit "QQ." already mentioned, (p. 11,) and the receipts and agreements executed and delivered to the defendants set forth in the record, pages 6 to 7, section 9, and also similar papers executed to other insurance companies at the same time, and then rested.

Rec., pp. 6 to 11, Secs. 9 to 10.

The plaintiffs then called their managing owner, Mr. Wickham, and offered to prove what took place at the interview between him and Messrs. Oakley and Weldman, the committee appointed for that purpose; and the testimony offered, tended to show that the committee said that they could not consider the claim of raising and saving the vessel, as they had no power to do so, but they were ready and willing to pay the amount of the proofs of loss with-

out discount or delay, and that there was no compromise of the whole claim.

Rec., pp. 12, 13, Sec. 10.

20. This parol testimony tended to vary and contradict the papers put in evidence, and was, when offered, objected to by the defendants as not admissible in the absence of fraud, misrepresentation or mistake. This objection was overruled by the presiding judge, and the evidence was received and submitted to the jury.

Rec., p. 13, Sec., 10.

The record distinctly finds that there was no evidence that said agreement, Exhibit "QQ," and the receipts and discharges executed by the plaintiffs, and set forth in the record, were obtained by fraud or misrepresentation of the defendants or their agents.

Rec., p. 17, Sec. 17.

The court divided in opinion upon the admissibility of this parol testimony. The presiding judge holding it to be admissible, it was admitted.

Rec., p, 17, Sec. 20.

The certificate of division clearly sets this up. (See page 18.)

Growing out of this, and measurably depending upon this division, another question arose upon which the judges also disagreed, namely: Whether the defendants were entitled to a verdict under the facts set forth in the record.

The whole case was then submitted to the jury upon the parol and other testimony, and a verdict was rendered for the plaintiffs, and the case brought here on a certificate of divison.

MOTION OF DEFENDANTS IN ERROR.

The motion to dismiss on this case, is founded upon four distinct points of law, which may be thus briefly stated:

a. The record does not show such a distinct question of law upon which the judges divided, as can give this court jurisdiction.

b. That the whole case is certified instead of distinct points of law.

c. That it does not show a division of opinion existing between the judges.

d. That the case certified does not give this court jurisdiction.

LAW.

The law governing the cases certified to this court by a division of opinion, is perfectly settled by numerous decisions of this tribunal, and with these we have no conflict.

Several of these points are very clearly and concisely stated in a recent decision of this court.

Jewell vs. Bright, 123 U. S., 432.

a. Each question as certified must be a distinct proposition of law clearly stated.

b. They must be questions of law only, and not questions of mixed fact and law.

c. Nor can the whole case be sent up by a certificate of division.

Daniels vs. R. R., 3 Wall., 256.
Welth vs. N. E. M. Co., 106 U. S., 605.
State Bank vs. St. L. R. R. Co., 122 U. S., 23.

d. Nor can mere abstract questions of law be sent up. In the language of Judge Swayne: "It is necessary that the question should involve a distinct legal point, and that sufficient evidence should be set forth to show its bearings upon the rights of the parties."

Hovemeyer vs. Iowa Co., 3 Wall., 304.

Or as was stated more recently by Judge Miller, "In short, while such a statement of facts must accompany the certificate, as to show that the question of law is applicable to the case, the point on which the judges differed must be a distinct question of law clearly stated.

Waterville vs. Van Slike, 116 U. S. 701

e. If more than one question is certified to this court, and any one of these questions is a proper one, it gives this court jurisdiction although other questions are not proper ones, and it will answer the proper questions, leaving the other questions unanswered as was done.

Hams vs. Elliott, 10 Pet., 55-6.
Hovemeyer vs. Van Slike 3d Wall., 304.

The principal question in this case is whether the court was divided in opinion upon any single point of law, or was it a mixed question of law and fact. We submit that the question of the admission of parol testimony, to vary and contradict the written agreements in the case was purely a question of law. As we have seen, it was nesessary to set forth facts sufficient to show how the question arose, and how it applied to the case.

The facts set forth as to the evidence show :

a. The plaintiff made out a *prima facie* case,

both as to the insurance and the loss and the amount thereof.

b. The defendants showed by written agreements, signed by the plaintiffs below, a full and a complete discharge of all such liabilities, or in other words, a full accord and satisfaction of the entire claim under said policies.

Record, pp. 6 to 11.

There was no other evidence in the case when this question arose.

It was not claimed that these contracts had not been delivered as binding contracts, nor was there any ambiguity as to their true meaning that required parol testimony to clear up.

The synopsis of one of the receipts given to the defendants, sufficiently shows this.

See Record, p. 11.

The paper first acknowledges the receipt of $1344.42. "It being in full all of the claims and demands for the loss or damage by fire, which occurred on the 10th and 24th of November, 1883," to the property insured by the policy number, and in consideration of such payment, said policy is to be canceled and surrendered to said company, and all further claims by virtue of said policy is forever waived.

It is difficult to imagine a paper more clear and full and distinct and exact than this.

It is claimed that the fact that it had reference only "to loss or damage by fire," was intended to exclude the indirect loss of raising the vessel, but the balance of the paper disposes of that objection, for all further claims by virtue of said policy, was waived.

c. The record shows in clear and express terms that under this state of facts, the plaintiff offered parol evidence not to show fraud or misrepresentation in the obtaining of said papers thus executed, but for the purpose of showing what they intended by such writings.

Record, pp. 11 and 13.
Record, p. 17, Section 20.

We submit, that under this state of facts the question of the admissibility of such parol testimony was clearly one of law. If this was so, it was entirely immaterial whether it was decided rightfully or wrongfully, for its merits do not arise upon this motion, but is to be decided at the final hearing.

There is no question but that as a general rule of law, when parties reduce a contract to writing, that contract cannot be varied by parol testimony, either as to the colloquium that occurred at the time of the making thereof, or of a different understanding from that expressed.

1st Greenleaf on Evidence, Secs. 275 and 281.
2d Wharton's Evidence, Sec. 920.
2d Parsons on Contracts, 535.

The doctrine is very clearly stated in a recent New York case, by Judge Andrews, of the court of appeals. "The rule that parol evidence is inadmissible to add to or vary the terms of a written contract, precludes evidence of the negotiations which precedes, or conversations which accompany the making of it in relation to the subject matter thereof, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by the inspection of the written instruments."

Corse vs. Peck, 102 N. Y., 515.

This doctrine is recognized in a very large number of cases, some of which we cite.

Buck vs. Buck, 98 U. S., 511.
Biffinger vs. Twyes, 120 U. S., 205.
Seper vs. Atlantic Ins. Co., 120 Mass., 267.
Carr vs. Hogs, 110 Ind., 414.
Carpenter vs. Jamison, 6 Mo. App., 216.
The Kansas C. & O. R. Co. vs. Hicks, 30 Kansas, 238.

There is an exception to this rule in relation to simple receipts for money. They being only *prima facie* evidence of such receipt, and may be contradicted by parol, but as is stated by Parsons, "This is true only of a simple receipt."

2d of Parsons, 555.
1st Greenleaf's Evidence, No. 305.
Coon vs. Knap, 4 Seld., 402.

And as was stated in a well considered case, "If the receipt is in the nature of a contract, it is so far within the general rule, and is not liable to be varied by parol evidence."

Eggliston vs. Knickerbocker, 6 Barb., 466.

But it is objected that the question in relation to the admissibility of the parol testimony has reference to the facts shown by the record, and that such facts are not distinctly found, and that it is therefore a mixed question of law and fact, and cannot be properly certified.

We submit, that there is no force in this objection.

The cases cited to sustain this position, are not in point. They are radically different from the present case.

They required the court to draw inferences from the facts, as is clearly shown by the cases.

Williamsport Bank vs. Knapp, 119 U. S., 357.
State Bank vs. St. R. R. Co., 122 U. S., 21.

The facts set forth in this record, previous to the offering of parol testimony, were simple and undisputed, and it was necessary to set them forth to show why the parol testimony was or was not admissible, and without such record it could not be determined whether it was or was not admissible.

1. All the testimony that was given in the case is found in the record.

Record, pp. 17, 21.

2. There was no conflict in the evidence until the parol testimony was introduced against the objection of the defendants.

3. As we have seen, the facts thus proved show a *prima facie* case for the plaintiffs.

4. The agreement and receipts showing a full settlement and discharge, in other words, an accord and satisfaction of the whole claim.

These were the "facts" that were before the court when the parol testimony was offered and was introduced, and the simply question was whether in the light of these indisputable facts, parol testimony was admissible to vary and contradict the agreement in writing, and this we submit was by the authorities a pure question of law. Up to this point the defendants had introduced no parol testimony, and what they did subsequently introduces, was simply to contradict the parol testimony introduced by the plaintiffs.

One of the questions arising was whether the defendants were, upon the facts stated, entitled to a verdict in their favor.

It may be claimed with some force, that this is a question involving the whole case, and cannot therefore be properly certified to this court, and if the parol testimony was properly before the jury it would be so.

We respectfully suggest that if the parol testimony was wrongfully admitted, it should not have been considered, then there was nothing that should have been submitted to a jury, but the defendant was entitled to a verdict, as a matter of law, as the claim of these plaintiffs had been fully discharged and settled, as shown by the papers.

But this point does not become material, for if the other question is a proper question to be certified, then this court has jurisdiction.

CONSIDERATION.

It is claimed upon the part of the defendants in error, that the parol testimony was admissible, because the written agrement of accord and satisfaction was not founded upon any consideration.

We say that question does not fairly arise on this motion.

But there was an ample consideration.

1. This fully appears upon the face of the receipts.

2. Even if it is assumed that the defendants were legally liable for the amount of the appraised loss covered by the receipts, there is still a perfect consideration for the agreement of accord and satisfaction.

The amount was paid 55 days in advance of its being due, and such payment is a goood consideration for the agreement.

2nd of Parsons, 618-19.
Smith vs. Brown, 3rd of Hawks., 280
Brooks vs. White, 2nd Met., 283.
2nd of Greenleafs, 29.

The Exhibit "QQQ," shows that this payment in advance was a consideration for the agreement of discharge.

See Exhibit "QQ," page 11.

ON THE JUDGES DISAGREEING.

It is claimed that the record does not show that there was any disagreement by the judges upon the point made, and that it is a mere *pro-forma* division.

It is claimed because the district judge in his charge to the jury, charges them to consider this very testimony that was thus introduced against his objection, therefore he harmonizes with the Circuit Judge upon this point.

Unquestionably the charge of Judge Brown is as stated, but he could make no other.

The opinion of the Circuit Judge in relation to the admissibility of this parol testimony, was to prevail, and the District Judge was bound to charge accordingly.

The record very clearly shows a distinct, positive disagreement upon the question certified.

Rec., p. 15.

CONCLUSION.

We say, therefore, that neither of the points mentioned in the motion are well taken.

1. The record does clearly show that a distinct question of law was raised by the defendants' objection to the introduction of parol testimony to vary and contradict the written agreement of the plaintiffs.

2. The whole case was not certified up, but only enough of the facts necessary to show: 1st. Whether the parol testimony was admissible. 2nd. Whether, upon the facts stated, the defendants were not entitled to the verdict.

If this last was not a proper question to be certified, the first clearly was, and this gave the court jurisdiction.

3. It does most clearly appear that a disagreement of opinion actually existed between the judges as to the question certified.

4. We have shown that this court has jurisdiction in the certified record.

C. J. Hubbell
of Counsel for
Plaintiffs in Error

Supreme Court of the United States.

No 1032

THE FIRE INSURANCE ASSOCIATION, (Limited,)
Plaintiff in Error,
vs.
JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK,
Defendants in Error.

Case certified on division of opinion from the U. S. Circuit Court for the Eastern District of Michigan.

Motion to dismiss Writ of Error and remand Cause.

Supp Journal *BRIEF IN SUPPORT OF MOTION.*

H. H. SWAN,
Counsel for Defendants in Error.

DETROIT:
Potter Printing Co., 47 Buhl Block.

1888.

Supreme Court of the United States.

October Term, 1888.

THE FIRE INSURANCE ASSOCIATION, (Limited,) *Plaintiff in Error,* *vs.* JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK, *Defendants in Error.*	No. 1032.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS.

The grounds of the motion to dismiss and the facts in issue are fully stated in the brief of Mr. Frank H. Canfield, to which this is merely a supplement, and I forbear their re-statement as not required by the spirit of the rules of this court, which, were this brief a wholly independent discussion, would demand it.

I.

The first question certified does not present a point of law which gives this court jurisdiction.

First. The question is expressly qualified by and wholly dependent for answer, "on the facts stated in the foregoing record." There are no facts found upon which the question can be answered.

The statement referred to is a mere narration of conflicting evidence. "It is not," to quote the language of the opinion in

Jewett vs. Knight, 123 U. S., p. 434.

"a statement of ultimate facts leaving nothing but a conclusion of law to be drawn; but it is a statement of particular facts in the nature of matters of evidence upon which no decision can be made without inferring a fact that is not found."

In the case just cited there was what the judges of the circuit court intended as a finding of facts. In the case at bar there is not, nor could there be—the trial being before a jury—even the semblance of a finding of facts. It is true the judges do state, paragraph sixteen, Rec., p. 17, that there was no evidence that said "Exhibit QQ," and the said several receipts and discharges executed by the plaintiff hereinbefore set forth, were obtained by any fraud or misrepresentation of the defendants or their agents, "but waiving the commentary which the facts stated and the verdict make upon this finding it is submitted that the determination of the issue of fraud *vel non* was solely for the jury under the charge of the court.

Jewell vs. Knight, supra.

Ogilvie vs. Knox Ins. Co., 18 How., 577, 581.

In the same case it is said of questions certified to this court," * * * * "it has been established by repeated decisions that each question so certified, must be a distinct point or proposition of law clearly stated, so that it can be definitely answered *without regard to other issues of law or of fact in the case.*"

123 U. S., 432,

In *Waterville vs. Van Slyke*, 116 U. S., 704, the court says of the statutory precedure authorizing certificates of division, "It is meant to meet a case where, two judges sitting, a clear and distinct proposition of law material to the decision of the case arises on which differing, they may make *such a certificate as will enable this court to decide that question,*" or the questions, if more than one, embraced in the certificate.

Again, in *Enfield vs. Jordan*, 119 U. S., 680, 692, this court said of a question certified which was "too general in its terms to admit of a precise answer," * * * "As no proper answer can be given to a question stated in such broad and indefinite terms which admits of one answer under one set of circumstances, and of a different answer under another, we must necessarily pass it by as immaterial to the decision of the case in this court."

And in Dennistown vs. Stewart, 18 How., 568,
And Wilson vs. Barnum, 8 How., 258,

it is held, that the questions certified must be questions of law and not of fact.—Not such as involve or imply *conclusions or judgments by the judges* upon the weight or effect of testimony or facts adduced in the cause.

In *Webster vs. Cooper*, 10 How., 54, one of the grounds on which the case was remanded was that "the whole case had been divided into points and sent up to this court, and several of the latter points could not have arisen on the trial until the previous ones were first decided." * * * * That it "would impose upon it (the court) the duty of deciding in the first instance, not only the question of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise as previous questions were ruled the one way or the other."

It is submitted that the first question certified is obnoxious to each one of these rulings.

a. It explicitly and in terms asks, not a question of law upon *ascertained* facts, but one which can only be answered by reference to conflicting evidence, and which is dependent on the issues of fact in the case.

b. It is not a question which this court is able to decide without assuming or finding matters of fact which are for the jury.

c. It admits of different answers, as the evidence of the plaintiff or defendant is taken as the basis of the question.

d. It is wholly dependent upon the character and intended function of the papers referred to in the question, which was a matter for the jury under the charge of the court.

In reply to this, it may be urged that the purpose of the question is to elicit the opinion of this court on the legal effect and operation of the papers mentioned; i. e., whether they are contracts within the meaning

of the rule excluding parol testimony to vary or contradict them. To this there are several obvious rejoinders:

1. The certificate does not ask that question.

2. If it did, it would present the whole case to this court.

3. To assume that the papers, Exhibit "Q. Q.," and the drafts and receipts constitute the contract of accord and satisfaction pleaded, is to beg the very question of fact in issue between the parties. The issue tendered by the plea was upon the execution and delivery *animo contrahendi* of these papers, and the nature and sufficiency of the consideration therefor. Two witnesses testify they were so delivered, and upon a consideration which if found is valid, but which is not recited in the papers, and is only proveable by parol. One witness with equal means of knowledge, testifies as positively that the papers were made and delivered *alio intuitu* and without such consideration

The matter pleaded as the consideration of the alleged accord and satisfaction, is confessedly not the consideration expressed in the papers. The plea and notice allege disputed liability, and the payment of the money mentioned in the drafts and receipts in settlement thereof, and of all claims under the policies pursuant to the mutual agreement of the parties. The record shows that, as the case stood when the defendant objected to the parol testimony, the plaintiff had shown two classes of damage covered by the policies, viz: one which both parties had designated as "the loss and damage by fire," which amounted to $15,364.78; the second or "further claim." for the ex-

pense of raising and saving the vessel which the record shows (p. 6.) was upwards of $15,000. Plaintiffs admitted payment of the first claim, and and proved defendants refusal to pay its share of the second, and on this *prima facie* case rested.

In support of the defence pleaded, defendant put in evidence Exhibit "QQ," and the drafts and receipts, (Rec., pp. 6 to 11), and, the signatures being admitted, *without offering further evidence*, rested its case. It is conceded that the amount paid plaintiff is the exact amount of "the loss and damage by fire," viz: $15,364.78, of which defendant only paid its share. Rec., p. 16. Paragraph 15). There was then *no evidence* of any other consideration moving to the plaintiffs for the receipts and drafts, and the sums specified therein than "the loss and damage by fire," specifially mentioned in them. The effect and operation of the papers and the payments for which they receipted, must, as a matter of law, be limited to the discharge and extinguishment only of the amount of the claim covered by the payment which thus far in the case, and for all that was shown by the papers was an *undisputed* liability of the defendant. It was neither pleaded nor do the papers show that the payment by the insurers of the $15,364.78, before the lapse of the sixty days mentioned in the policies was made or intended as any part of the consideration for the alleged accord and satisfaction, or as a consideration in whole or in part for the settlement of the plaintiff's "further claim" for the expenses of raising and saving the vessel.

The mere fact of payment of the fire loss before due, without more, is, in the law, no consideration

for the discharge of the salvage claim, for "nothing is consideration that is not regarded as such by both parties." To regard it as such, "would be to make a contract for the parties to which their minds never assented." An unknown or accidental consideration is not sufficient.

Philpot vs. Gruninger, 14 Wall. 577.
Ellis vs. Clark, 110 Mass., 389, 392.

And so the district judge charged the jury, in substance.

There was therefore, when defendant rested, no contract shown, i. e. no agreement upon sufficient consideration, by the papers referred to, affecting the plaintiff's "further claim." Exhibit "QQ," and the receipts and drafts were, as to that claim, utterly void and without effect, for want of consideration. How then, can arise the question whether parol evidence was admissible to contradict or vary the papers mentioned in the first question, when the record shows that there was no legal contract to be varied or contradicted.

To give these papers the effect claimed for them, and sustain its plea it was obviously necessary for the defendant to connect the payments they recite with a valid contract for the settlement of *both* claims which the papers themselves do not establish. To do this the defendants subsequently add the testimony of Wellman and Oakley. It is *their* testimony and not anything *of legal effect* in the papers which the parol testimony of the plaintiffs contradicted. The issue was between parol testimony and not between the writing and the witness Wickham.

This issue was matter of inquiry for the jury

under the charge of the court, and which "could not be taken from them without the consent of both parties," and if the consent were given, "it would be ineffectual to clothe this court" (or the judges of the circuit court) "with a power not conferred by law."

Daniel vs. The Railroad Co., 3 Wall. 257.

Bayliss vs. Travelers' Ins. Co., 113 U. S., 316.

Yet this certificate takes for granted the very fact in issue, for it is manifest that unless it be assumed that these papers express the contract of the parties, and *in themselves* prove the defense pleaded the question of the admissibility of the parol evidence cannot arise in the case. A party cannot be put in the attitude of seeking to vary or contradict a contract, until such contract is shown, nor can he until then be excluded from denying to papers put in evidence, the character and effect claimed for them by the opposite party on the ground that such denial would contradict or vary the instrument. "His defense begins one step earlier," as said by Erle, J., in 6 Ellis & B., 372. Was there an agreement of accord and satisfaction of both claims upon a valid consideration? Were the papers referred to executed to express that contract, or are they limited to "the loss and damage by fire," to which the parties had confined their appraisers by Exhibit "A?"

Answers to these inquiries are necessary prerequisites to the ulterior question presented by the certificate, "which cannot arise until the previous ones are first decided," to quote from *Webster vs. Cooper*, 19 How., 55.

The primary question is purely one of fact. The dependent and secondary question as to the medium

of proof, is inseparable from the inquiry into the fact, and is not a pure question of law.

"The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument."

Brick vs. Brick, 98 U. S., 510.

It only applies when the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement.

Harris vs. Rickets, 4 Harl & Nor., p. 6.

In *Mobile & Montgomery R. R. Co. vs. Jurey, 111 U. S., 591*, parol evidence that goods, for which a bill of lading had been given, were shipped under a verbal contract was objected to, as here, on the ground that it contradicted the bill of lading. This court said: "The contention is that the bill of lading was the contract and being in writing no parol evidence could be received to vary its stipulations. *Before this rule can be applied the contract in writing must be shown to be the contract of the parties.* One of the vital questions in the case was: what was the contract between the parties? * * * * It is plain upon the statement of the controversy that evidence of the parol contract was perfectly competent, and it was a question to be decided by the jury whether the understanding detailed by the witnesses or the bill of lading expressed the agreement of the parties."

As put by Wharton, Wharton on Evi., Sec. 927: "The first question to determine in construing a docu-

ment is whether there is a document to construe," or as expressed in *Wake vs. Harrop*, 6 H. & N., 775 "It is always open to the parties to show whether the written document is the binding record of the contract."

In *Pym vs. Campbell*, 6 Ellis & Black, 370, 374, where the rule of evidence here presented was invoked, the court say: * * * * * "The parties may not vary a written agreement, but *they may show they never come to any agreement at all, and that the signed paper was never intended to be the record* of the terms of the agreement for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible," per Compton, J.

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all, is admissible."

Per Erle, J., citing Davis vs. Jones, 17 C. B., 625.

"The rules excluding parol evidence have no place in any inquiry in which the court has not got before it some ascertained paper beyond question *binding and of full effect.*"

Pollock's Principles of Contracts, p. 440.
Guardhouse vs. Blackburn, L. R., 1 P. & D., 115.

While these rulings expressly decide the question of evidence which would seem to belong rather to the argument upon the merits, the equally patent corollary from them is that in the conflict of evidence as to the existence of and consideration for the alleged agreement, the question first certified neither did nor could "occur on the trial" as a pure point of law within the meaning of the law, even if it were not

qualified and limited to the admissibility of the evidence," "on the facts stated in the foregoing record."

Again if as has been urged, the papers mentioned in the question are inoperative against the claim for raising and saving the vessel, because of want of sufficient consideration, the inquiry is pertinent whether there is any actual conflict between the papers thus limited and the parol testimony.

In both Exhibit "QQ," and the drafts and receipts, and in Exhibit "A," their specific subject matter is designated as "the loss and damage by fire." Are those words used in the same sense in all these instruments? If so, the oral testimony of the plaintiffs is entirely consistent with the writings, for by Exhibit "A," the parties defined the phrase "the loss and damage by fire," as excluding any claim "for saving the boat and cargo." (Rec., pp. 26, 27.)

There is nothing on the face of Exhibit "Q. Q." and the drafts and receipts, excepting the general words of release of claims under the policies to indicate that the words "the loss and damage by fire" were used in any larger sense in them than in Exhibit "A." The amount of the expressed consideration is persuasive to the same construction. If that phrase has the same meaning in all the papers, or if there is doubt as to its interpretation, the oral testimony was competent to apply the writing to their subject matter, and there was no conflict.

Bradley vs. Washington &c. Packet Co., 13 Peters, 89.
United States vs. Peck, 102 U. S., 64.
Barreda vs. Silsbee, 21 How., 147.
United States vs. City Bank, 10 How., 385.

and the question became one for the jury under the charge of the court—a mixed question of law and fact.

II.

The Record shows no actual difference of opinion between the Judges.

The charge of the court was given by the district judge. (Rec., p. 18.) It nowhere intimates the slightest disagreement between the judges, as to the legal question presented by the question certified. It is part of the certified case. If it is permissible to refer to the charge given by the district judge, which has been sent to this court under the second subdivision of Rule 8, of this court, and which was given on the former trial had before the district judge alone; the charge in the record will be found to be an almost exact reproduction of that on the first trial. Under *Railroad Company vs. White*, 101 U. S., 98, the division of opinion certified would seem to be clearly *pro forma*, and gives this court no jurisdiction.

III.

The Second Question Certified, is one of which the Court has no Jurisdiction.

Whether "under the facts" set forth in the record the defendant is entitled to recover, is not a question of law which can be certified to this court.

State Bank vs. St. Louis Rail. Co., 122, U. S., 21.
Williamsport Bank vs. Knapp, 119, U. S., 357, 360.

It is submitted that for the reasons and upon the authorities cited, the writ of error should be dismissed for want of jurisdiction.

HENRY H. SWAN,
Of Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE FIRE INSURANCE ASSOCIATION
(LIMITED)
Plaintiff in Error,

vs.

JOHN W. WICKHAM, JR., AND
WM. B. COMSTOCK,
Defendants in Error.

Case certified on Division of Opinion from the U. S. Circuit Court for the Eastern District of Michigan.

MOTION TO DISMISS WRIT OF ERROR AND REMAND CAUSE.

BRIEF IN SUPPORT OF MOTION.

F. H. CANFIELD,
Counsel for Defendants in Error.

DETROIT:
John F. Eby & Co., Printers, 65 & 67 West Congress St.
1888.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE FIRE INSURANCE ASSOCIATION (Limited),
Plaintiff in Error

vs.

JOHN W. WICKHAM, JR., and WILLIAM B. COMSTOCK,
Defendants in Error

No. 1032.

Case certified from the Circuit Court of the United States for the Eastern District of Michigan.

Motion to Dismiss Writ of Error and to Remand, and Brief in Support of Motion.

The defendants in error, by F. H. Canfield, their counsel, come and respectfully move the court that the writ of error in the above entitled cause be dismissed, and that said cause be remanded, for the following reasons:

1. Because the record does not show that any such question of law occurred at the trial of said cause before the said Circuit Court, upon which the judges thereof were opposed, as gives this court jurisdiction of the cause.

2. Because it appears from the record that the whole case between the parties has been certified into this court, and not distinct points of law arising therein, upon which the judges of said court have disagreed.

3. Because it does not appear from the record that a disagreement of opinion actually existed between the judges of said court upon the questions certified.

4. Because the case, as certified, is not one of which this court has jurisdiction.

This motion is based upon the record in the cause printed by the clerk of the Supreme Court, and upon the transcript of the case filed therein in his office.

F. H. CANFIELD,
Counsel for Defendants in Error.

BRIEF IN SUPPORT OF MOTION.

This suit was brought upon two policies of fire insurance issued by the defendant company, now plaintiff in error, upon the propeller "St. Paul," of which the plaintiffs below, now defendants in error, are the sole owners.

That the court may the better understand this motion, we call attention to the following statement, which we think is sustained by the record.

The declaration was in assumpsit, the plea the general issue, with notice that the defendant would show an accord and satisfaction.

On November 10, 1883, while the propeller was on a voyage to Lake Superior, a fire broke out in her hold, and in order to extinguish it and save the vessel and cargo, she was scuttled and sunk. She was subsequently, and at large expense, raised and brought to Detroit for repairs, where she arrived on November 19. On November 24, while her cargo was being unladen in order to make such repairs, another fire broke out in her hold, and to extinguish it she was again necessarily sunk for the purpose of saving the vessel and cargo, and was afterwards again raised at a considerable expense.

On December 15, 1883, a written agreement was entered into, between the plaintiff and the agents of the several companies having risks upon the vessel, for the purpose of adjusting the amount of the loss caused by the fires to the hull, furniture, engine and boiler of the propeller, which agreement, marked "Exhibit A," is set forth in the record at page 26. As appears from the face of this paper, after it had been signed by the plaintiffs, and before it was signed by the insurers, this clause was added: "*And this agreement does not apply to or cover any question which may arise for saving boat and cargo.*"

The appraisers appointed under this agreement reported that the loss occasioned by the fires, to wit, the cost of repairing the hull and machinery, restoring the furniture, exclusive of the expense of raising and saving the boat and cargo, amounted to $15,364.78.

An adjustment of this direct loss by the fires was made under the agreement, and the amount of said loss as reported by the said appraisers, viz., $15,364.78, was apportioned among the several companies according to the amounts respectively insured by each. Formal proofs of loss, as estimated by said appraisers, were made out and sent by the adjusting agent of the companies on January 12, 1884, to the several companies at their offices in New York, accompanied by a letter from the adjuster, stating that the insured would have a further claim for expenses of raising the propeller, to be thereafter submitted. (See printed record, p. 5.)

At the trial it was admitted that the cost of raising and saving the vessel, the "further claim" referred to by said adjuster, was upwards of $15,000. It was also admitted that the defendant had paid the sum apportioned to it, as the cost of repairing the vessel under the apportionment above referred to, but it was contended by the plaintiffs that in addition to the cost of repairs which they had received,

they were entitled to recover from the defendant its proportion of the expenses incurred in raising and saving the vessel.

Before the commencement of the suit plaintiffs had demanded payment of this further claim, which was refused, the insurers denying liability therefor.

Under its plea of accord and satisfaction, the defendant offered in evidence two receipts, one of which was as follows:

"$1,344.42. January 19th, 1884.

Received from the Fire Insurance Association, of London, England, thirteen hundred and forty-four and forty-two one-hundredths dollars. It being in full of all claim and demands for loss or damage by fires which occurred on the 10th and 24th days of November, 1883. The property insured by policy No. 180,617, Buffalo, N. Y., agency. And in consideration of said payment said policy is hereby cancelled and surrendered to said Company, and all further claim by virtue of said policy forever waived.

(Signed) JOHN W. WICKHAM, JR.
W. B. COMSTOCK,
Per Wickham."

The other receipt bears the same date, and was for $576.18, being the amount chargeable against defendant as the cost of the aforesaid repairs under its other policy, being No. 181,252. Except as to amount, its terms are similar to their receipt above set forth.

Defendant also offered the following endorsement, made upon the first named policy:

"January 19th, 1884.

In consideration of four and forty-seven one-hundredths dollars return premium, the receipt of which is hereby acknowledged, this policy is cancelled and surrendered to the Fire Insurance Association of England."

(Signed by the plaintiffs.)

Also a similar endorsement upon the back of the other policy.

As corroborative evidence to sustain its plea of accord and

satisfaction, the defendant also offered in evidence certain other receipts given by the plaintiff to the other companies, except the Continental, (see record, pp. 7, 8, 9, 10); also a paper, or certificate, marked "Exhibit Q Q," and which is set forth in the printed record at page 11.

The defendant then rested, and the plaintiffs in rebuttal offered evidence tending to show that in January, 1884, Wickham went to New York; that on January 18th a meeting of the companies interested in said loss was held at the Board Rooms in New York, at which meeting Messrs. Wellman and Oakley were appointed a committee to confer with said plaintiffs in regard to said loss; of this meeting Wickham had no notice and was not present; that on the following day Wickham met said Wellman and Oakley, and was notified by them that they were appointed such committee, and that the companies were ready and willing to pay the expense of making the repairs occasioned by said fires as set forth by the proofs of loss heretofore mentioned; that Wickham called attention to the claim for raising and saving the vessel, stating that he expected to get a contribution to such expenses from the owners of the cargo, upon a general average, and for the sake of settlement offered to share the balance of such expenses with the fire insurers in the proportion that the uninsured interest in the steamer bore to the amount insured; that the committee replied that the companies were not liable for such expenses, and *that they had no authority whatever to consider the claim for raising and saving the steamer*; and thereupon gave to said Wickham the following paper marked "Exhibit P P," stating to him that the same was a record of the proceedings of the meeting at which they were appointed such committee, and that their authority was limited by the terms of the resolution adopted at such meeting and set forth in said exhibit, and that they could not go beyond it or consider his claim for raising and saving the vessel even if they were disposed to do so.

EXHIBIT "P P."

BOARD ROOMS, January 18, '84.

Meeting of the companies interested in loss on Propeller St. Paul. Present:

Continental	$7,500.00.
Fire Insurance Ass'n	5,000.00.
Queen's	7,000.00.
Exchange	2,500.00.
Mechanics', N Y	2,500.00.
Greenwich	2,000.00.
	$26,500.00.

Organized by Mr. Wellman, Chairman.

Communication from Jno. M. Murray, Adjuster at Detroit, in relation to expenses incurred in saving propeller St. Paul.

On motion, duly seconded—

That the request of the assured to help him out is not granted, but the companies are recommended to pay the amount of claim as set forth in the proofs of loss. Carried.

Meeting adjourned.

(Signed) G. W. MONTGOMERY.

Plaintiff also offered evidence tending to show that the committee further stated that the companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs to said steamer necessitated by the fire, without discount, and *would waive any rights they might have under the policies' making the loss payable in 60 days from the time the proofs were furnished;* that the plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of said claim spoken of except by Wickham, when he offered to settle as hereinbefore stated, which offer was declined by the committe as above stated, *upon the ground that they had no authority to consider the matter.*

The plaintiffs also offered evidence to show that at said interview, Mr. Oakley, in behalf of the Mechanics' Insur-

ance Co., gave Wickham a check for the amount of the loss adjusted as aforesaid against his company, being $960.30, and Wickham then signed the receipt for that amount to said company, and *after the receipts were signed and delivered*, the paper Exhibit "Q Q." was prepared under the direction of Oakley, and given to Wickham to exhibit to the representatives of the other companies to show the amount of said adjusted loss which had been apportioned against said companies respectively (record, 13).

The plaintiffs also offered evidence to prove that *after* Exhibit "Q Q." had been signed he was asked to surrender his policies under the following clause therein contained, viz: "This insurance may be terminated at any time at the "option of the company, on giving notice to that effect to "the insured, either verbally or by leaving such notice at "his last known place of residence or business. In such "case the insured shall be entitled to claim a ratable propor- "tion of the premiums for the unexpired term for which "the policy was to run;" and that the surrender of such policies was made in compliance with such demand under said clause, in consideration of the payment to him of the unearned premiums (record, p. 15).

It appears from the printed record, p. 17, that the defendant claimed that the certificate of apportionment, Exhibit "Q Q.," together with the receipts and drafts, as a matter of law, show a full settlement of this entire claim, and an accord and satisfaction; while the plaintiffs claimed that the settlement related solely to the loss covered by the proofs of loss already mentioned, and was not intended and did not embrace the claim for raising the vessel and cargo, and saving the same.

The defendant claimed that the entire claim was settled, and that it was so understood by both parties (record, p. 17).

It is also shown that both parties offered parol testimony to sustain their contentions.

The defendant (see printed record, p. 17) requested the

court to charge the jury that the defendant was entitled to a verdict.

In paragraph 20 of the record, page 17, it is stated that "the court divided as to whether the parol evidence offered "was admissible, and the presiding judge holding that it was "admissible, it was admitted; and this question of what the "parties intended by said settlement and accord and "satisfaction, was submitted to the jury under the charge of "the court hereto annexed, and *upon such parol testimony "and the papers set forth*, a verdict was rendered for the "plaintiffs for the sum of $2,297.65."

For the plaintiffs it was insisted that—

1. No agreement of compromise was made or entered into; and

2. If any such agreement was made, *it was void for want of consideration*.

The entire case is covered by these two issues.

This is apparent from the record as certified, and especially from the charge of the court to the jury, which was delivered by the District Judge, and is made a part of the certificate. (See record, pp. 18 to 26, inclusive.)

The jury were instructed that the insurers were liable for the expense of raising and saving the vessel, as well as for the cost of the repairs made necessary by the fire and constituting the claims set forth in the proofs of loss which were furnished; that the receipts were *prima facie* evidence that the entire claim had been paid, and that the plaintiffs could not recover unless they proved by a preponderance of testimony, "either that this claim for raising and saving the vessel was not intended to be included in the receipts and in the settlement, or that there was no consideration for the release of this claim."

In the course of his charge the district judge said to the jury: "The question in the case is, and I repeat it at this "point in my charge, Did these parties compromise and "settle, understanding that they were compromising and "settling the plaintiffs' entire claim against these insurance "companies? If such was the understanding between the

"parties *and there was a consideration for it*, of which I "shall have something to say hereafter, for the release of "this claim, it is a perfect defense to this suit. If, on the "other hand, you find that this was intended only as a pay- "ment of the plaintiffs' claim for the direct loss occasioned "by the fires, and that they reserved or intended to reserve "this right to prosecute this claim for the recovery of the "wrecking expenses, then the plaintiffs are entitled to "recover" (record, p. 21).

And again at page 22 the district judge said: "Now, as "I said, I think the claims of the plaintiffs against these "companies were fair subjects for discussion and compro- "mise, and if you find the entire claim of plaintiffs was "compromised, *upon a 'sufficient consideration*, then your "verdict should be for the defendant; and it makes no dif- "ference what your opinion may be in regard to the nature "of the compromise, whether it was favorable or unfavor- "able to the plaintiffs; that can only be considered by you "in considering the probability of the compromise having "been made."

And again, at page 23, he says: "So far as the question "of consideration is concerned, if you find that the sum of "fifteen thousand-odd dollars was in settlement of this "entire controversy between these parties, the consideration "is sufficient to support this settlement; and I further charge "you that by the terms of the policy the defendants were "not obliged to pay the loss by fire upon the property "insured until the sixty days had elapsed provided for in "the proofs of loss. The amount claimed by virtue of the "policy in this case was not therefore due until sixty days "after the proofs of loss were served upon the companies "at their offices. The payment of the policies fifty-five "days in advance of the time when the same would become "due without discount for interest, was in itself a sufficient "consideration for waiving the plaintiffs' further claim under "the policies, *if it was understood as such*. This prepay- "ment of fifty-five days, to be a sufficient consideration "for the release of the plaintiffs' claim for the wrecking "expenses, *must have been understood between the parties "to be such*, and this prepayment is a sufficient considera- "tion to support the settlement by which the $15,000 was "paid in full, *if it was understood as such*."

And the district judge further charged the jury (p. 25 of the record): "Now, gentlemen, it is for you to say, not-

"withstanding these receipts, whether the plaintiffs did "intend to surrender and cancel this claim; whether the "settlement was intended as a settlement of his claim for "wrecking expenses connected with this loss."

In regard to the surrender of the policies, the district judge also charged the jury as follows: "The surrender of "these policies is evidence, and pretty strong evidence, it "seems to me, of the intention of the plaintiff to reliquish "his entire claim, and yet it is not sufficient of itself to "defeat his right of recovery. If you find the policies "were surrendered in consideration of the unearned pre- "mium stated on the receipt of the policies, then the defense "of a surrender is no defense in the suit, and while the "surrender has a tendency to show his relinquishment of "all rights under the policy, still it is not conclusive evi- "dence if you find, as you are at liberty to do, that the "surrender was made in consideration of the unearned "premium."

The case is formally certified to this court upon what is claimed to be a division of opinion between the judges of the Circuit Court.

In behalf of the defendants in error, we now move the court that the writ of error issued in the cause be dismissed, and that the cause be remanded for want of jurisdiction.

Brobst vs. Brobst, 4 Wall., 2.

I.

BECAUSE THE POINTS CERTIFIED ARE NOT DISTINCT POINTS OF LAW ARISING IN THE COURSE OF THE TRIAL, UPON WHICH THE JUDGES OF THE CIRCUIT COURT HAVE DIFFERED IN OPINION, AND WHICH THIS COURT HAS JURISDICTION TO CONSIDER.

The points certified are, substantially:

First—Whether upon *the facts set forth in the Record*, the parol testimony offered in evidence was admissible.

Second—Whether defendant, *under the facts in the Record set forth*, was entitled to a verdict.

See Record, p. 18.

Now, the record contains no finding of facts. The facts *claimed* by the respective parties are indeed stated, or rather a summary of the evidence offered to prove these facts. But the facts as claimed by the plaintiffs are inconsistent with those claimed by the defendant; and the evidence offered by the parties is clearly contradictory.

See paragraphs 10, 11, 12 and 13 of the record, pp. 11, 12 and 13.

This is further shown by the charge to the jury given by the district judge.

Record, pp. 21, 22, 23 and 24.

We submit that this court cannot determine whether the defendant was entitled to a verdict "under the facts set forth," or whether the parol evidence was admissible "on the facts stated in the record," when the record contains no finding of facts, but only a statement of the evidence offered by each party.

Jewell vs. Knight, 123 U. S., 484.

But if the statement of the case contained in the record can be treated as a finding of the facts, it is not such a finding as this court ought to consider, for the reason that the facts as found or stated, are the finding of the court (below) and not of the jury.

As the case was tried by a jury, the jury alone could make a valid finding of facts for *any* purpose. The court had no authority to find the facts; that was wholly a matter for the jury. If it were competent to certify the questions as to the defendant's right to a verdict "*under*

the facts stated in the record," or as to the admissibility of the parol evidence "*under the facts stated in the record*," the facts should have been found by the jury in the form of a special verdict. To allow the court to make any finding or statement of facts, which shall be binding upon the parties for any purpose, would be a practical denial of the plaintiffs' constitutional right of a trial by jury.

Daniels vs. Ry. Co., 3 Wall., 257.

But even if the record can be regarded as a statement of facts properly found, the case is not such a one as this court can consider upon a certificate of division of opinion, as it would then fall directly within the case of *State Bank vs. St. Louis Rail Co., 122 U. S., 21;* which was a suit to recover the amount of certain checks drawn on the bank; a *jury having been waived*, the facts were specially found by the court, and the two judges certified that *upon those facts* they were opposed in opinion as to the legal right of the plaintiff to recover upon the checks in controversy; it was held the question was not one which could be properly certified.

In the opinion delivered by Mr. Justice Gray, it is said: "The matter in dispute being less than $5,000, the jurisdic-"tion of this court depends upon the certificate of divsion "of opinion, whether, upon all the facts found by the court, "the plaintiff has the legal right to recover upon the checks "in controversy."

"But the office of a certificate of division of opinion "between two judges in the Circuit Court is to submit to "this court one or more points of law, and not the whole "case, nor the general question whether upon all the facts, "as agreed by the parties in a case stated, or specially found "by the court when a trial *by jury has been waived*, the "judgment should be for the one party or the other.

"In *Harris vs. Elliott*, 10 Pet., 25, one of the questions "certified was, '*upon the facts stated*, whether the plaintiffs "'have any right or title to the lands taken for streets, in "'which the trespass is supposed to have been committed,

"'and can maintain their said action.' This court held that "it could express no opinion upon that question, because, as "said by Mr. Justice Thompson in delivering judgment, it "'is too general, embracing the merits of the whole case, "'and does not present any single point or question; and "'it has been repeatedly ruled in this court, that the whole "'case cannot be brought here, under the act of 1802, upon "'such a general question.' The subsequent decisions under "the successive acts of Congress upon this subject are uni- "formly to the same effect. *United States vs. Briggs*, 5 "How., 208; *Nesmith vs. Sheldon*, 6 How., 41; *Water- "ville vs. Van Slyke*, 116 U. S., 699; *Williamsport Bank "vs. Knapp*, 119 U. S., 357."

II.

THE RECORD SHOWS THAT THE WHOLE CASE HAS BEEN CERTIFIED TO THIS COURT, AND NOT DISTINCT POINTS OF LAW ARISING THEREIN, UPON WHICH THE JUDGES OF THE CIRCUIT COURT HAVE DISAGREED.

In support of this proposition, we ask the court to consider carefully the nature of the issues which were presented at the trial in the court below.

The suit was brought to recover the expense incurred in raising and saving the vessel,—the payment of the cost of repairs, which constituted the claim set forth in the proofs of loss which were served, being admitted by the plaintiff. The defense set up in the plea was, that after the fire the plaintiffs had made claim in writing by preliminary proofs, and that the liability of the defendant company to contribute its proportionate share to the claims set forth in the proofs of loss was disputed; that the parties not agreeing, entered into negotiations for settlement, which resulted in the payment by the defendant of the sum of $1,920.60,

"which valuable consideration, or sum of money so paid as "aforesaid, was accepted in full payment and satisfaction of "the plaintiff's claim against the defendant under its two "policies." The plea also avers that in consideration of *said sum of money so paid*, the plaintiffs then and there released the defendants from all further liability; and that afterwards the plaintiffs received from the defendant the unearned premiums upon said policies, and *in consideration thereof* released and discharged the defendant from any future contingent liability under said policies.

It will be seen that the testimony offered by the plaintiffs and referred to in the first question certified, taken in connection with the documentary evidence, viz: Exhibit "A," record, 26, Exhibit "P P," record, 12, and Exhibit "Q Q," record, 11, tends to establish the following facts:

1. That from the outset the insurers treated the loss consequent upon the fire as constituting two distinct claims, one being the cost of repairing the vessel, or the direct loss by the fire, as it is termed in the record, and the other the cost of raising and saving the vessel.

2. That they admitted their liability for the former, but denied their liability for the latter.

3. That the claim set forth in the preliminary proofs of loss embraced only the cost of the repairs. (Such indeed is the averment of the plea.)

4. That the amount of this claim, instead of being disputed as averred in the plea, had been fixed and determined by appraisers mutually chosen under the agreement, Exhibit "A," and that the proofs of loss referred to were made out and forwarded by the insurers' own adjuster.

5. That by the resolution which was adopted at the meeting of the companies which was held before any interview or negotiation had taken place between them and Wickham

and at which Wickham was not present, the companies agreed, substantially, to pay the claim set forth in the proofs of loss, but "not to recognize" the claim for raising and saving the vessel.

6. That the committee appointed by the insurers under said resolution, when they subsequently met Wickham, represented to him that the companies were satisfied with the adjustment and proofs of loss, and were ready and willing to pay the cost of making the repairs, which constituted the claim set forth in the proofs of loss, without discount, and *would waive any rights they might have under the policies*, making the loss payable in sixty days from the time the proofs were furnished. They also stated to him that they had no authority to consider the claim for raising and saving the vessel; that their authority was limited by the terms of the aforesaid resolution, and they could not consider that claim even if they were disposed to do so.

7. That the plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was that claim spoken of, except by Wickham, when he offered to compromise the same upon the basis mentioned at page 12 of the record, which offer was declined by the committee upon the ground that they had no authority to consider the matter.

8. That the paper, Exhibit "Q Q," was prepared simply as a statement of the proportionate amount of the claim set forth in the proofs of loss which each company was to pay.

9. That the surrender of the policies was made simply in consideration of the *unearned premiums* therein, and pursuant to a provision contained in the policies giving the insurers the right to demand the surrender upon repayment of the unearned premiums.

It was claimed by the plaintiffs that it was competent to establish these facts:

1st. To show that the claims set forth in the proofs of

loss, and referred to in the defendant's plea, were limited to the claim for the expense of repairs.

2d. To show that this claim was an *undisputed* claim, thus contradicting the averments of defendant's plea in this regard.

3d. To show that no agreement of compromise was made between the parties.

4th. To show that even if such an agreement was made, *there was no consideration to support it.*

5th. To show that the receipts offered in evidence by the defendants covered only the undisputed claim for the cost of repairing the vessel, set forth in the proofs of loss; in other words, to show the subject-matter to which said receipts were intended to apply.

6th. For the purpose of placing the court and jury in the same light in which the parties acted, so as to enable them to see the situation and facts and circumstances which surrounded the parties at the time the receipts and said Exhibit "Q Q" were executed.

The alleged agreement of compromise upon which the defense to the action is based, would be invalid unless supported by a sufficient consideration. The only consideration which is claimed for it is the payment of the claim for the cost of repairs, about which there was no dispute whatever, (the liability for which was admitted by the insurers from the outset), before the lapse of sixty days after the proofs of loss were furnished. But the right to delay this payment until the sixty days had expired was a right which the insurers could waive. And whether the prepayment of this conceded claim is to be treated as a consideration must depend upon the intention and understanding of the parties at the time the alleged agreement was made. The district judge following the authority of *Philpot vs. Gruninger*, 14 Wall., 570, and *Ellis vs. Clark*, 110 Mass., 389, instructed the jury

that the prepayment would be a sufficient consideration, *if it was understood as such* (record, 24).

The question whether this prepayment of the plaintiffs' admitted claim was understood and intended as a consideration for the alleged compromise, or whether the insurers waived their right to delay the payment until the sixty days had expired, was fairly submitted to the jury; and the verdict establishes the fact that there was no consideration for it.

Want of consideration may always, as between the parties, be shown by parol. The parol evidence offered in this case was competent for this purpose, if for no other, and the question whether the evidence was admissible to "contradict" the receipts, becomes immaterial, because, if we admit what in fact we deny, that the receipts under the facts and circumstances of this case show, *prima facie*, an agreement of compromise, still the agreement itself must fail for want of consideration.

Before proceeding further we desire to call the attention of the court to the fact that the prepayment of the cost of repairs is not set forth as the consideration for the alleged compromise by any averment in the plea; and that the only consideration for the surrender of the policies averred in the plea is the repayment of the unearned premiums.

But it is evident, in any view of the case, that the legal effect to be given the receipts, and to "Exhibit Q Q," whether they were intended as a contract of compromise of the claim for raising and saving the vessel, and whether there was any consideration to sustain the same, was a mixed question of law and fact for the consideration of the court and jury, to be determined from all the facts and circumstances surrounding the parties at the time they were executed, and it therefore follows that the admissibility of the testimony referred to in the first question certified necessarily embraces the whole case—the whole defense, and is

not a pure question of law, such as the statute authorizes to be certified.

West vs. Smith, 101 U. S., 263, 270.
Barreda vs. Silsbee, 21 How., 168.
United States vs. City Bank of Columbus, 19 How., 385.
Mobile & Montg'y. Ry. Co. vs. Jurey, 111 U. S., 584.

The parol testimony was offered *in connection with the paper Exhibit "P P." and the agreement appointing the appraisers, Exhibit "A,"* to show that no agreement of compromise was made; and also to show that if such agreement was made, it was without any consideration and therefore void.

Upon these points there was a clear and distinct conflict of testimony, and the district judge charged the jury that if they were satisfied that no such an agreement was made, or if they should find that there was no consideration to sustain it, the accord and satisfaction pleaded was not made out, and the plaintiff was entitled to a verdict.

The question certified therefore embraces the entire case, and cannot be considered by this court, under numerous decisions, of which we cite the following:

Waterville vs. Vanslyke, 116 U. S., 699.
Jewell vs. Knight, 123 U. S., 426.
California Paving Co. vs. Molitor, 113 U. S., 609.
Weeth vs. New Eng. Mort. Co., 106 U. S., 605.
State Bank vs. St. Louis Rail Co., 122 U. S., 21.
Daniels vs. R. R. Co., 3 Wal., 250.
Nesmith vs. Sheldon, 6 How., 41.

2. The second question certified is more clearly one which involves the entire case. Whether under all the facts in the record, or upon all the evidence, the court should have directed a verdict for the defendant, must

necessarily involve the entire case, and could not, therefore, be properly certified into this court.

Dennistoun vs. Stewart, 18 How., 565.

III.

THE RECORD DOES NOT SHOW THAT A DISAGREEMENT OF OPINION ACTUALLY EXISTED BETWEEN THE JUDGES OF THE CIRCUIT COURT UPON THE QUESTIONS CERTIFIED.

We have already shown that the charge to the jury was given by the district judge (See record, 18). It was carefully considered and covers the entire case. It embraces both of the questions certified. The district judge clearly pointed out to the jury the effect to be given to the receipts as evidence; but he also instructed the jury that it was for them to say, "notwithstanding these receipts, whether the "plaintiffs did intend to surrender and cancel this claim; "whether the settlement was intended as a settlement of "his claim for wrecking expenses connected with this loss." And again at page 23 of the record, he said to the jury: "Was this settlement intended as the settlement of the "plaintiff's *entire* claim against the defendants?" and he then calls attention to the oral testimony given by the several witnesses sworn at the trial, referring to them by name.

Thus the admissibility of this parol testimony, and its competency as evidence, was expressly recognized and maintained by the district judge.

We submit that the charge as given by the district judge is really in accord with what is stated in the record, to have been the opinion of the circuit judge upon both questions certified. The case therefore falls within the decision of this court in *Railroad Co. vs. White*, 101 U. S., 98, in which it was said: "To bring about a disagreement under these "circumstances, the district judge must have held that the

"instruction was wrong; but, instead of that, we find his "opinion in the record, apparently delivered in disposing "of the motion for a new trial, in which he maintains with "much force the correctness of the instruction."

* * * * * * * * * * *

"If the judges below are not able to agree upon the decision "of any question of law which is material to the determina- "tion of a cause presented to them, our jurisdiction may be "invoked to settle the differences; but in such cases, if it "appears from an examination of the whole record that no "such disagreement *actually* existed, we ought not to con- "sider the question, *even though it may be certified in "form.*"

Had there been an actual difference of opinion between the judges upon either of the questions certified, the instructions to the jury would undoubtedly have been given by the circuit judge, as under Rev. Stat., Sec. 650, his opinion would prevail. It cannot be presumed that the district judge would have charged the jury as he did unless he was of the opinion that it was a proper case to go to the jury. He must therefore have agreed with the circuit judge upon the second questioncertified. Nor would he have submitted the case to the jury "upon the parol testimony and the papers set forth," as stated in the twentieth paragraph of the record, unless he thought that such testimony was admissible. We submit that instead of an actual difference of opinion existing between the judges such as is contemplated by the statute, the charge to the jury shows that their opinions were in accord upon every material point involved in the case.

At a former trial, when the circuit judge was not present, the district judge charged the jury in almost the same identical language which he used in the charge set forth in this certificate; a certified copy of said former charge is filed with the clerk of this court as a part of the record, under Rule 8 of this court.

In *Webster vs. Cooper*, 10 How., 54, a *pro forma* decision was certified and the case was dismissed. In the opinion of the court delivered by Chief Justice Taney, it is said: "The irregularity and evil tendency of this practice has "upon several occasions attracted the attention of the court, "although it has been occasionally acquiesced in, and the "points so certified, acted upon and decided. But at "December term, 1847, the subject was very fully consid- "ered, and it was then determined that this practice ought "not to be sanctioned, and that that this court would in all "cases refuse to take jurisdiction, when it was obvious that "the whole case had been certified *pro forma* in order to "take the opinion of this court, without any actual division "of opinion in the Circuit Court. The result of this deter- "mination will be found in the case of *Nesmith and others "vs. Sheldon and others*, 6 Howard, 41. The case before "us cannot be distinguished from the one referred to. It is "true that it was certified before that decision was pro- "nounced. But the opinion in that case conformed to all "the opinions previously expressed by this court upon the "irregularity of this practice."

We submit that this case as certified shows only a *pro forma* division of opinion, and that upon this, as well as upon the other grounds suggested, the motion to dismiss should be granted.

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